Supreme Court, U. S.
FILED
SEP 17 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 75-1538

ROCCO MASTRANGELO and JOSEPH ADDOLORIA,

Petitioners,

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

HAROLD L. GOERLICH
Attorney for Petitioners
380 North Broadway
Jericho, New York 11753
(516) 921-2200

(9951)

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In The

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PETITIONERS' REPLY BRIEF

The petitioners respectfully submit the following reply to the government's answering brief to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The Opinion Below, Jurisdiction, and Questions Presented are the same as in the government's answering brief.

REPLY ARGUMENT

In the case at bar, the indictment filed on April 8, 1975 alleged the commission of crimes in March, 1972, more than three (3) years prior to the indictment.

In addition, it became clear at trial from the testimony of Paul Fleischer and others, that Fleischer, the government's main witness had been *cooperating* with the government since June of 1972 (T261, 262, 270, 933), and had given statements and information regarding his allegations against the petitioners as far back as *June of 1972.*

There has been a period of approximately three (3) years in delay from June of 1972 to April 8, 1975. Under the Second Circuit Rules, the government in all cases must be ready for trial within six months from the date of arrest, service of summons, detention or filing of a complaint, whichever is earliest.

Under Second Circuit Rule 4, it is not required that the defendant be tried within this period of time, but only that the government be ready for trial. The testimony of Paul Fleischer indicated that he supplied said information in June, 1972 and your petitioners were not informed nor brought to trial within this period, but three (3) years later. The case at bar clearly presents that if the defendants have the undefined duty to enforce their right to a speedy trial and if this burden is placed on the defendants, how can they comply if they are not informed of said charges?

Since the possibility of prejudice is inherent even in short delays, it seems fair to apply speedy trial limitations from the "earliest identifiable stage" of the criminal process. The prosecutor can avoid operation of the prescribed time periods simply by delaying the arrest and indictment of the defendant. See, *Harling v. United States,* 401 F.2d 392, 395 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1069 (length of delay may establish prejudice as a matter of law).

When the Sixth Amendment, the right to a speedy trial, is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution. The difficulty in such an approach, of course, lies in determining how long a prosecution must be delayed before prejudice is assumed:

> "the testimony in your Grand Jury Minutes in March of this year 1975, is different than the statement that you gave the F.B.I. in June 1972." (T691).
>
> "As a result of those statements, later on I got indicted, yes.
>
> Q. As a final result you did get indicted? A. Yes." (T376).
>
> "didn't he say that if you testified on some of these cases and tell us all about them, we will give you a new identity, and then you can start clean? Not the agent, 'somebody' told you that didn't they? A. Yes.
>
> Q. Who? A. United States Attorney.
>
> Q. When did he tell you that? A. In 1972, I think." (T358).

Despite the difficulties in proving actual harm in most cases, it seems that inherent in prosecutorial delay is "potential substantial prejudice" (*United States v. Wade,* 388 U.S. 218, 227 (1967)), to the interest protected by the speedy trial clause. The speedy trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions.

One court has stated that "We think that a showing of prejudice is not required when a criminal defendant is asserting a

constitutional right under the Sixth Amendment." Thus some courts have shifted the burden of proof to the government after long delay. *E.g., Williams v. United States,* 102 U.S. App. D.C. 51, 53-54, 250 F.2d 19, 21-22 (1957). Although prejudice seems to be an essential element of speedy trial violations, it does not follow that prejudice or its absence — if the burden of proof is on the government — can be satisfactorily shown in most cases. Certainly, as in the present case at bar, it is obvious that the government has delayed in clear bad faith.

There was no new evidence submitted in petitioners' case, nor were they informed that a complaint was issued in June of 1972.

In requiring defendants to show actual prejudice, federal courts have only confused the meaning and the enforcement of the constitutional right to a speedy trial.

By substituting the more definite standard of the passage of a specified time period, all four proposals under examination by this Court will lift an intolerable burden of enforcing the speedy trial. Guarantee will shift to the place where it belongs — the courts and society.

Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult, and it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses. As was stated in the case of *Ross v. United States,* 121 U.S. App. D.C. 233, 238, 349 F.2d 210, 215 (1965). The witnesses' failure of memory and their inability to reconstruct what they did not remember virtually precluded showing in what respects petitioners' defense might have been more successful if the delay had been shorter. In addition, the death of a witness prejudiced the petitioners due to the government's three year delay.

"A. You see, I had some records, but as I gave up the office on 2 West End Avenue because my wife died, some of the records got lost and I couldn't find them.

Q. Now, do you recall the year 1971 and 1972, those two years? A. I can only say how I treated this patient during this time, but I can't pinpoint because I don't have the records for those years so I cannot pinpoint it.

Q. Do you know when the last time you treated Rocky Mastrangelo was? A. Well, lately I didn't see him too often, but I did see him from — for a series of six, seven or eight years almost once a week, sometimes twice a week, sometimes every day because this was a strange, unusual case. Since we, discovered — should I give the story of the whole condition?" (Dr. Henri Ringelheim, T964, 965).

Also during this period of delay, *Mr. Sam Weinar* died. Petitioners believe that his testimony would have completely discredited the testimony of *Paul Fleischer.* Federal courts generally have held prejudice to be an essential factor in a constitutionally based finding of a speedy trial violation. See *United States v. Halley,* 431 F.2d 1180, 1182 (9th Cir.), *cert. denied,* 401 U.S. 916, *rehearing denied,* 401 U.S. 1004 (1970); Note, *The Right to a Speedy Trial,* 20 Stan. L. Rev. 476, 493 (1968).

The burden of showing prejudice usually rests with the defendant who may be required to show not only that the delay was prejudicial, but also that the government intended to harm the defense by the delay.

Courts have recognized that the potential for substantial prejudice inherent in the denial of any of these safeguards is so

great and the process of showing actual harm is so difficult, that prejudice must be assumed in order to protect effectively the important constitutional rights at issue. The presumption of prejudice should also extend to the speedy trial right, at least where delay is substantial. Prejudice, of course, should be assessed in light of the interest of defendants which speedy trial right was designed to protect. The Court has identified two such interests:

(i) to prevent oppressive pretrial incarceration;

(ii) to limit the possibility that the defense will be impaired. See *United States v. Ewell,* 383 U.S. at 120 (1966).

Of these, the most serious is the last because the inability of a defendant to prepare his case adequately, shows the unfairness of the system in this respect. If witnesses die, or disappear during a delay, the prejudice is obvious. There is also prejudice if the defense witnesses are unable to recall accurately events of the distant past.

> "Q. Now, agent Gilkerson, as you sit here today, do you have an independent recollection of everything that was seen and seized on that day? A. No.
>
> Q. Could your recollection be refreshed by your referring to your reports of that day? A. Yes." (Agent Gilkerson, T907).

Surely if the defendants and witnesses could not remember dates, times, places, and without the benefit of reports that were missing in some instances due to the delay in prosecution, it seems obvious, that even Agent Gilkerson, had to request written reports to refresh his memory due to the long period from the time the information was submitted to the time of indictment. Deliberate governmental delay in the hopes of obtaining an advantage over the accused in not unknown. In

such a circumstance, the fair administration of criminal justice is imperiled. The speedy trial guarantee that serves the public interest by preventing official abuse of due process and discouraging official lawlessness, was absent in this case. See *e.g., United States v. Provoo,* 17 F.R.D. 183 (D.C. Md.), *aff'd per curiam,* 350 U.S. 857 (1955). Thus this guarantee protects our common interest that government prosecute — not persecute — those whom it accuses of crime.

The government might appropriately bear this burden since it, far more than the defendant, is likely to know why the delay took place.

TO FURTHER DEMONSTRATE THE ISSUE THAT THE GOVERNMENT DELAYED THE PROSECUTION:

United States v. Paul Fleischer, No. 75-CR-275

71-CR-984

9/9/71, Indictment filed

11/11/71, Government's Notice of Readiness for Trial Filed.

A period of (63) days in which the government was ready for trial (see, Second Circuit Rule 4).

72-CR-12-1972 — Superseding Indictment Filed, Trial date set for Feb. 28th, 1972, a period of 14 days after new indictment filed.

It is not the duty of a defendant to assert that he be indicted under penalty of waiving his right to a speedy trial should he fail to do so. It is the duty of the public prosecutor not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have

waived his constitutional right to a speedy trial. *United States v. Dillon,* 183 F. Supp. 541, 543 (1960). The defendant in any event cannot force the beginning of his trial, even if he takes affirmative steps to that end. The present case provides a striking instance of this fact. The government, on the other hand, can and does set the case for trial at any time, thus constitutional right aside — the government must reasonably bear the burden of going forward with trial since it alone has the ultimate capacity to do so. The burden, moreover, might reasonably fall on the government since the prosecutor is the initiating party in criminal proceedings. *Cf.* Fed. Rule Crim. Proc. 41(b) (dismissal for failure to prosecute by the plaintiff).

The delay must not be purposeful or oppressive. There is no absolute test as to what constitutes purposeful delay. Bad faith or chicanery on the part of the government is not a necessary element. It is enough if the government has made a deliberate choice for a supposed advantage which caused as much oppressive delay and damage to the defendants as it would have caused if it had been made in bad faith. In the instant case, it appears that the government has made a deliberate choice to hold the criminal prosecution in abeyance. As a result of that choice, delay has ensued and fruits of the proceedings have undoubtedly aided the government with respect to its prosecution. Conversely, the choice has damaged and prejudiced the petitioners.

The criminal nature of delays in criminal trial has sparked interest in the long ignored Sixth Amendment (the right to a speedy trial), once called "one of the most basic rights preserved by our Constitution." Unlike the speedy trial right guaranteed by most state constitutions, the federal constitutional right has not been defined precisely either by judicial decision or by legislative enactment:

> "The only federal provision directly concerned with delay before trial provides only that if there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing the defendant to trial, the court may dismiss the indictment, information or complaint." Fed. R. Crim. Proc. 48(b).

Indeed, the Court's reluctance to specify standards for adjudication of speedy trial claims prompted the Honorable Justice Brennan to note that "many — if not most of the basic questions about the scope and content of the speedy trial guarantee remain to be resolved."

Not only have petitioners been denied their right to a speedy trial under the Sixth Amendment, but Mastrangelo's counsel Mastropieri's handling of the case in the District Court and his conduct, created a prejudicial effect upon the jury. The error substantially affected both petitioners' legal rights and obligations. See *Code of Professional Responsibility and Code of Judicial Conduct,* American Bar Association, April 1975:

Canon 7:

> *"A lawyer should represent a client zealously within the bounds of the law."*

Ethical Considerations, Duty of the Lawyer to the Adversary System of Justice:

EC 7-36:

> "Judicial hearing ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings." *Cf.* ABA Canon 18.

> "While maintaining his independence, a lawyer should be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears." ABA Canons 1 and 3.

In reference to the Disciplinary Rules:

> DR 7-101(3):
>
> ". . . prejudice or damage his client during the course of the professional relationship." *Cf.* ABA Canon 24.

The conduct of counsel cannot be questioned by petitioners but only submitted to this Court for review. Counsel Mastropieri, in argument, stated that the remarks made by the trial judge served to belittle, humiliate and intimidate him. These issues were resolved by the court, but the impact of the prejudice inflicted upon the jury can only reach one conclusion, that your petitioners were denied a *fair, unprejudiced* and *speedy* trial.

CONCLUSION

For these constitutional violations, petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

s/ Harold L. Goerlich
Attorney for Petitioners

APPENDIX A

ARGUMENT ON MOTION IN DISTRICT COURT PRIOR TO TRIAL

ARGUMENT

EVIDENCE OF THE PROPOSED SIMILAR CRIMINAL ACTS NOT CHARGED IN THE INDICTMENT IS INADMISSIBLE IN THIS TRIAL

Rule 404(b) excludes evidence of other crimes to show the character of the defendant, but then sets forth certain instances in which such evidence may be admissible:

> It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The word "may" was purposely included in this sentence to give latitude and discretion to the trial court. The original draft of the section was as it appeared in the final draft and was then revised so as to begin: "This subdivision does not exclude the evidence when offered. . ." This was done at the request of the Department of Justice (Department of Justice, Report 11-12, 1971; Suggestions of United States Attorney, Washington, D.C., 1971).

However when the revised draft was presented to Congress it was promptly changed back to its original form so as to allow the trial court to consider whether the probative value of the evidence is substantially outweighed by its prejudice. (Weinstein's Evidence, Vol. 2, p. 404-46).

Thus the question of probative value versus prejudice is left to the trial court.

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Judge Weinstein endeavored to reconcile the cases, and set forth some generalizations, stating however,

> In each individual case, the trial judge must decide whether the proffered evidence tends to make a consequential fact more or less probable. (Weinstein's Evidence, supra P. 404-50)

The generalizations are as follows:

Criminal intent and knowledge. Where the defendant seeks to explain his act as innocently done, similar acts would be admissible. In *United States v. DeCicco,* 435 F2d 478 2d Cir. 1970, certain guidelines were innumerated by the Second Circuit for when evidence of similar acts may be admitted. The Government in *DeCicco,* supra, wherein the charge was that of transportation of stolen goods in interstate commerce, introduced evidence of prior similar acts to prove intent. The Court stated that prior similar acts may be admitted to prove intent, but only where the question of intent is placed in issue. Such admission was found to be an abuse of discretion, the Court holding that the Government's case did not raise any substantial issue of intent, nor did the defense attempt to concede the act while disclaiming intent. The chief Government witness' testimony "if believed leads ineluctably to the conclusion that the defendants knew what they were doing. . . . Therefore whatever probative value the prior crimes of (the defendants) added to the prosecution's case on the issue of defendants' intent to commit conspiracy . . . was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants were a continuing band of art thieves and 'fencers'." *U.S. v. DeCicco,* supra.

The rule that the element of intent must be a substantial issue in the trial to allow proof of similar acts to show intent finds strong support in this Circuit. The element of intent must

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be placed in issue "either by the nature of the facts sought to be proved by the prosecution or the defense. *U.S. v. Byrd,* 352 F2d 570 and 575 2d Cir. 1965. Should the defendant in opening put intent in issue, such evidence would be admissible on the direct case. *U.S. v. Cohen,* 489 F2d 945, 2nd Cir. 1973.

In the case at hand, the evidence sought to be admitted is that of *subsequent* similar acts. It would seem logical that the rule of *DeCicco* that evidence of similar acts should be admitted only where the question of intent is placed in issue, should be followed even more stringently where the alleged acts occurred subsequent to the act charged in the indictment.

In *Hubby v. United States,* 150 F2d 165, 5th Cir. 1945, where the defendant was charged with concealing and selling drugs, it was held that evidence of transaction similar to those charged in the indictment but subsequent thereto could not be used to supplement or strengthen evidence adduced to prove the substantive count. "Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial . . . and to lead them unconsciously to render their verdict in accordance with their views of false issues. . . ." *Paris v. U.S.,* 260 F 529 at 531, 8th Cir. 1919.

Knowledge. Where a defendant admits he committed the crime but was unaware that a criminal act was being committed. This does not apply to the instant case.

Motive. This applies to evidence of other crimes in order to show defendant's state of mind. This would not be applicable.

Identity. Whether the particular defendant is the person who committed the act can be a consequential fact which might allow admission of evidence of similar crimes.

Plan or Design. Similar criminal activity has been admitted to show a plan or design.

Appendix A

In the instant case the effect of admitting the proposed evidence would prejudice the defendant's rights and lead the jury to conclude these defendants are professional hi-jackers. The balance that must be observed in determining whether such evidence is admissible is whether its potential for prejudicing the defendant outweighs its probative value. *U.S. v. Papadakis*, 510 F2d 287, 294 (2nd Cir. 1975).

CONCLUSION

The proffered evidence of alleged subsequent similar acts of these defendants is not admissible in the trial of this action because there does not exist a sufficient question of intent to overcome the prejudice such evidence will create in the minds of the jurors.